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No. ....
IN THE

Supreme Court of the United States

October Term, 1980

SOUTHERN CALIFORNIA FINANCIAL CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioner, Southern California Financial Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on September 10, 1980.

QUESTIONS PRESENTED

1. Where the United States has effectively taken the fee or other permanent interest in land through a series of congressionally authorized condemnation suits that purported to take a lesser interest, may the landowner be denied compensation under the Fifth Amendment on the ground that the Executive failed to request from Congress a sufficient appropriation for the interest in land actually taken?

2. Does the sole remedy of asserting bad faith or abuse of discretion as a defense against a condemnation suit satisfy the Fifth Amendment requirement that the owner receive just compensation for private property actually taken for public use?

3. After the United States sought and obtained an order of the District Court striking the defense of abuse of discretion from the landowner's answer to the complaint in condemnation, thereby leaving only the Court of Claims with jurisdiction to hear the issue, may the Court of Claims ignore its own controlling precedent and send the landowner back to the District Court to attempt to litigate the same defense previously stricken on the United States' motion?

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OPINIONS BELOW

On October 1, 1979, after a full trial on the issue of liability, the United States Court of Claims, Trial Division, filed its Opinion, Findings of Fact and Conclusion of Law (Appendix ["App."] A) holding that petitioner is entitled to recover just compensation for the taking of the fee or other permanent interest in the land which is the subject of this case. On September 10, 1980 the United States Court of Claims dismissed the petition on the ground that, as a matter of law, there was no express or implied authorization for the taking where the executive branch had failed to obtain an appropriation from Congress for the specific interest in land that was taken. The Opinion of the Court of Claims, not yet reported, appears in Appendix B hereto.

JURISDICTION

This action is brought pursuant to the Fifth Amendment and the Tucker Act, 28 U.S.C. §1491. The judgment of the United States Court of Claims was entered on September 10, 1980. A timely motion for rehearing *en banc* was denied on October 31, 1980 (App. C), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1255(1).

Constitutional Provision and Statutes Involved

The following constitutional provision and statutes involved in this case are set forth in Appendix J:

Fifth Amendment, United States Constitution;
The Tucker Act, 28 U.S.C. §1491;
The Declaration of Taking Act, 40 U.S.C. §258a;
10 U.S.C. §§2663, 9773.

STATEMENT OF THE CASE

This is an inverse condemnation action pursuant to the Fifth Amendment and the Tucker Act, 28 U.S.C. §1491.

Petitioner Southern California Financial Corporation owns in fee simple a tract of land adjacent to the bomb and ammunition storage area of March Air Force Base in Riverside, California. The Air Force requires the use of 119.5 acres of petitioner's property to serve as part of a safety or buffer zone around the ammunition dump. Upon trial of this action it was stipulated that this is a valid public purpose and that petitioner's property is necessary for the safety or buffer zone. (Plaintiff's Exhibit 78, p. 12, ¶6; Tr. 32; App. A, Finding 15).

The ammunition dump is of permanent construction on land owned in fee simple by the United States. At trial it was stipulated that March Air Force Base is now and will

be in the foreseeable future a major military installation of the U.S. Air Force and that, so long as ammunition storage areas are necessary to its function, a safety and buffer zone surrounding the ammunition dump will be required. There are no plans to discontinue the use of March Air Force Base or the ammunition dump, and the trial judge concluded that the Government has a permanent need for petitioner's property. (App. A, Findings 16-18).

In order to secure the use of the subject property for the safety zone, from 1949 through 1961 the Government leased the property from petitioner's predecessors in interest pursuant to an unbroken series of one-year leases. The non-exclusive leases provided that the lessor retained joint use of the property, for agricultural purposes only. (App. A, Finding 2). In 1961 the owner declined to voluntarily renew the lease, and from 1962 through the present the Government has maintained uninterrupted control over the property by condemning successive leases for a fixed term, generally in five year blocks consisting of a one-year lease with four one-year renewal options. The Government has proceeded by way of declaration of taking and concurrent condemnation suit pursuant to the authority of the Declaration of Taking Act, 40 U.S.C. §258a, and 10 U.S.C. §§2663, 9773, which authorize the acquisition of land for military purposes. (App. A, Findings 4-14).

The basic one-year term of the successive leasehold condemnations is not reflective of any temporary character of the Government's need for the property, which it recognized to be a permanent need as early as 1956. (App. A, Findings 20-30). Rather, the Air Force has continued to acquire the property through condemnation of successive one-year leases because this was less expensive than acquisition of the fee or other permanent interest (App. A, Findings 25-30, 34) and for reasons of administrative convenience. Spe-

cifically, acquisition of these successive one-year leasehold interests allows the leases to be funded from the Air Force's annual operation and maintenance budget rather than requiring authorization under complicated procedures of an annual Military Construction Program. (App. A, Findings 34-38).

The series of leases the Government has condemned provide for non-exclusive use, reserving to the landowner the right to conduct agricultural operations but prohibiting commercial and residential development and gatherings of more than twenty-five persons on the property. (App. A, Findings 5(c), 8(c), 10(c), 12-14). However, given the facts that cultural costs and property taxes on the land far exceed the value of crops that can be raised on the semi-arid parcel, the right to conduct agricultural operations that is reserved to petitioner is worthless. At trial both plaintiff's and defendant's expert witnesses agreed that the property is not economically suitable for conducting agricultural operations. (App. A, Findings 49-52; Tr. 67-71, 74-77, 103-108, 351, 353-354).

Since commercial or residential development of the property is now prohibited by the Government's condemned leasehold interest, and since the property is not economically suitable for agricultural operations, the only other possible use for the property would be holding for development in the future. At trial both plaintiff's and defendant's expert real estate appraiser witnesses agreed that, considered apart from governmental restrictions on use, the economically viable use of the property would be to hold for speculation for future development, though they differed somewhat on the precise timetable on which development could be expected to occur. (Tr. 122-123, 171-173, 351, 355, 357; App. A, Findings 53-57, 65-69). However, since the Government has a permanent need for the subject property as

a safety and buffer zone for the ammunition storage area (App. A, Findings 14-18), petitioner will never be restored to unrestricted possession of the property and will never be able to develop it.

Under the formal terms of the leases condemned by the Government, petitioner has a reversionary interest in the property, but that interest exists only "on paper." Since petitioner will never get the property back due to the Government's need for a safety zone around the ammunition dump, the reversionary interest is not real and has no value. (Tr. 132-134, 173-174, 177-179, 186-187, 189). Agriculture, the only use allowed under the terms of the Government's condemned leases, also has no economic utility (App. A, Findings 49-52), and petitioner has therefore been deprived of any and all uses of the property. Under these circumstances, a taking of the fee or other permanent interest in the property has occurred. (App. A, Finding 71).

Petitioner purchased the property in 1969, and the next of the Government's successive leasehold condemnation actions was instituted in 1972. Petitioner's answer to the complaint in condemnation alleged affirmative defenses that: (1) the selection of the land to be condemned was arbitrary and capricious, and (2) the Government's condemnation of a succession of one-year leases had actually effected a taking of the fee, for which petitioner should be compensated in the condemnation court. (App. F at 63-64). The Government moved to strike the affirmative defenses on the grounds, *inter alia*, that "The Estate Taken is a Temporary Interest by the Terms of the Taking" and that "The Defendant May Not Challenge the Estate Taken in This Proceeding [in the District Court]." (App. G at 71, 73). Thereafter, petitioner filed a notice of non-opposition to the motion to strike the affirmative defenses, reserving its right to pursue the issues raised in the Court of Claims.

The District Court granted the United States' motion to strike the affirmative defenses. (App. A, Finding 48; App. H, I). Thereafter, petitioner filed the present action in the Court of Claims, and the condemnation proceedings in the District Court have been stayed pending the outcome of this action.

Upon trial of the action, the Court of Claims, Trial Division, held that petitioner has been deprived of all reasonable uses of its property; that an authorized inverse condemnation of petitioner's land took place in 1973; that petitioner is entitled to just compensation upon delivery of an appropriate deed to the Attorney General; and that the amount of compensation and the specific interest to be conveyed by the deed should be determined in further proceedings in accordance with Rule 131(c), Rules of the United States Court of Claims.

Without questioning any of the trial judge's findings of fact (App. B at 43), the Court of Claims dismissed petitioner's claim on the sole ground that the taking was not authorized and, thus, not compensable where the Executive could, but did not, secure a sufficient appropriation from Congress for an interest in land of the magnitude actually taken. (App. B at 43-48). The Court stated that petitioner's remedy was to seek dismissal of the condemnation suit or, if necessary, an injunction against the taking on the grounds that the Government's practice of securing a permanent interest through the device of successive condemnations of term interests is not in good faith or in the exercise of proper discretion. (App. B at 48-49).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Conflict With the Prior Decisions of This Court, the Courts of Appeals and the Court of Claims Itself.

This case presents the question of whether a property owner may recover money damages as just compensation under the Fifth Amendment where the Government institutes a formal condemnation suit but actually takes a greater interest in land than that specified in the declaration of taking.

It is settled law that the landowner's remedy for the actual taking of property which is not included in the declaration of taking does not lie in the condemnation court. Rather, the remedy is an action for damages under the Tucker Act in the Court of Claims. *United States v. 40.60 Acres of Land, Etc.*, 483 F.2d 927, 928 (9th Cir. 1973); *United States v. 3317.39 Acres of Land, Etc.*, 443 F.2d 104, 106 (8th Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972); *United States v. 1440.35 Acres of Land, Etc.*, 438 F.Supp. 1070, 1071-1074 (D. Md. 1977). Consistent with these authorities and the Court of Claims' own decision in *Peerless Coal Co. v. United States*, 215 Ct.Cl. 1045, 1046 (1978), the Court of Claims, Trial Division, found that the Government had taken the fee or other permanent interest in petitioner's land and that petitioner was entitled to recover just compensation for the value of the interest taken.

The Court of Claims concluded that the taking was not authorized and therefore not compensable, and that petitioner's proper remedy was to seek dismissal of the condemnation suit or, if necessary, an injunction against the taking. This decision conflicts with the Court of Appeals decisions cited above, which hold that a landowner's remedy is a suit under the Tucker Act in the Court of Claims where the gravamen of the complaint is that the Government has

actually taken a greater interest in land than that specified in its declaration of taking.

The decision below further conflicts with the prior decisions of this Court and the Court of Claims regarding the authorization that is necessary to give rise to a compensable taking. If sustained, the Court of Claims' decision would vitiate the Fifth Amendment and the Tucker Act as remedies by which a landowner could obtain money damages as compensation for the Government's actual taking of a greater interest in land than that alleged in its declaration of taking.

In the case at bench, the executive branch manifestly did have congressional authorization for the actions that it took. The series of condemnations of a term interest in petitioner's property that resulted in an effective taking of the fee or other permanent interest were all brought under the express congressional authority of the Declaration of Taking Act, 40 U.S.C. §258a, and the authorization granted to a Secretary of a military department to designate and acquire property necessary for military operations, 10 U.S.C. §§2663, 9773. (App. A, Findings 5(b), 8(b), 10(b), 12-14). Thus, there was unquestionable congressional authority for the acts that resulted in the taking for which petitioner seeks just compensation.

The relevant inquiry is whether the *acts* of which petitioner complains were authorized; the fact that budget-minded Air Force officials might not have foreseen the *legal consequence* of those acts has no bearing on petitioner's entitlement to just compensation under the Fifth Amendment and the Tucker Act. In *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922), Mr. Justice Holmes explained that:

> "As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the *acts* even if the possible

> *legal consequences* were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not." (Emphasis added).

See also United States v. Causby, 328 U.S. 256, 267 (1946). *Cf. Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (The Constitution's principle of just compensation "measures a taking of property not by what a State says, or by what it intends, but by what it *does*.").

The *Portsmouth Harbor* analysis quoted above is basic to determination of whether there was express or implied authorization for a compensable taking. The principle stated was central to the trial judge's opinion (App. A at 9), and it was not disputed between the parties to this action upon hearing in the Court of Claims.[1] However, this principle was never even mentioned in the Court of Claims' opinion, although rejection of this controlling principle regarding the issue of authorization for a compensable taking is the implicit basis for the decision below.

The Court's conclusion that the taking was not authorized and therefore not compensable where the Executive could,

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[1]The trial judge's opinion and findings (App. A at 9, 39) rejected the argument that the taking was not authorized, and this point was neither excepted to nor briefed by the Government in its exceptions to the trial judge's opinion and findings before the Court of Claims. *See* Rules 141, 143 and 144 of the Rules of the United States Court of Claims. Regarding the trial judge's Intermediate Conclusion of Law and Fact No. 72, that "the taking was authorized" (App. A at 39), the Government excepted to the implication of permanence in the word "taking" but did not except at all to the conclusion of "authorized". (Defendant's Exceptions to Trial Judge's Findings of Fact and Intermediate Conclusions of Law and Fact and Conclusion of Law at 10). Since there is nothing in Defendant's Rule 143 Memorandum of Law to the Court of Claims that disputes the conclusion that the taking was "authorized", the Government apparently accepted the trial judge's opinion on this point.

but did not, secure a sufficient appropriation from Congress for the interest in land actually taken is irreconcilable with *Portsmouth Harbor* and *Causby*. Just as in the present action, those cases involved actions of military authorities that could be deemed to impose an easement or servitude on private property and thereby give rise to a taking compensable under the Fifth Amendment. Just as in the present case, the military authorities could have obtained, but did not obtain, an appropriation for the specific interest in land for which the property owner sought just compensation. Nevertheless, this Court found implied authority for the takings in those cases based on the objective acts, not the subjective intent, of the Government officers.[2]

The decision below is almost exclusively concerned with protecting Congress against a potentially spendthrift Executive in matters of intra-governmental procurement practices, and it ignores the Fifth Amendment's purpose:

> "to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

The typical inverse condemnation case is " '*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the gov-

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[2]*Portsmouth Harbor* and *Causby* cannot be meaningfully distinguished from the present action on the ground that they are "physical intrusion" cases. (App. B at 47, n. 6). In the case at bench, petitioner will never be allowed to use its property because it is *necessary* for a *safety* and buffer zone adjacent to the permanent bomb and ammunition storage area of March Air Force Base. (App. A, Findings 15-18, 22, 28, 71; App. B at 41). In *Portsmouth Harbor* the gravamen of the case was not a technical trespass but, rather, the threat that the artillery shells fired overhead might fall on plaintiff's property. The case at bench involves exactly the same kind of threat: the possibility of injury due to an explosion at the adjacent bomb and ammunition storage facility.

ernmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *United States v. Clarke*, 445 U.S. 253, 257 (1980). The case at bench illustrates this model, for petitioner seeks to recover for that portion of its rights in the property that the Government has taken in fact, though without formal condemnation. But the Court of Claims' rationale would bar recovery in the typical case where the taking agency failed to follow available procedures to secure an appropriation.

The decision below also squarely conflicts with the Court of Claims' recent decisions in *Foster v. United States*, ... Ct.Cl. .... , 607 F.2d 943, 949-951 (1979), *Benenson v. United States*, 212 Ct.Cl. 375, 387-388, 548 F.2d 939, 946-947 (1977), *Drakes Bay Land Co. v. United States*, 191 Ct.Cl. 389, 409-413, 424 F.2d 574, 585-587 (1970), and *Eyherabide v. United States*, 170 Ct.Cl. 598, 606, 345 F.2d 565, 570 (1965). In each of these cases federal officers, acting within the scope of their duties as in the case at bench, did acts which resulted in the legal consequence of a compensable taking. But in each of these cases the taking agency did not have an appropriation of funds for the property at the time of the taking. The rationale of the decision below would require an opposite result in each of these cases, and it throws the law on this subject into turmoil.

In *Foster, supra*, the Government had purchased certain land for Vandenberg Air Force Base pursuant to a deed that contained a reservation of mineral rights in the grantors, their successors and assigns. Later the Air Force prevented the plaintiffs from using their mineral rights, yet it did not condemn those property interests. *Id.* at 607 F.2d 949-950. Although the Air Force's actions had resulted in an actual taking of an interest in land for which Congress had not

made an appropriation, the Court concluded that plaintiffs were entitled to be compensated. *Id.* at 607 F.2d 951.[3]

In *Benenson, supra*, the Court concluded that there was an authorized and compensable taking even though Congress had specifically considered acquisition of the Willard Hotel, had not appropriated funds for acquisition, and "there was no indication as to when or if Congress would provide the essential funds." *Id.* at 212 Ct.Cl. 387, 548 F.2d 946-947.

In *Drakes Bay, supra*, Congress appropriated funds that could have been used to acquire the plaintiff's property, but the Department of the Interior chose to spend the appropriations on other parcels and exhausted its funds without buying plaintiff's land. *Id.* at 191 Ct.Cl. 409-411, 424 F.2d 585-586. In holding that plaintiff was entitled to recover compensation for the fee, the Court explained that:

> "It may be thought that our holding frustrates the intent of Congress because that body obviously intended that payment for land acquired for the National Seashore should be made out of funds budgeted and appropriated by it in modest amounts annually. The trouble is, it intended other things too. . . . As to Point Reyes, the Congress must be presumed to have been aware that it had previously enacted a Tucker Act, which was available in case the convergent pressures on any landowner became great beyond its expectation,

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[3]The Court also noted that, as a practical matter, the Government could never allow plaintiffs to mine their mineral deposits because they would not be allowed to use military roads or conduct blasting operations that would interfere with missile launching and tracking. *Id.* at 607 F.2d 950. Similarly, in the present case, the Government could never allow petitioner to use, develop or dispose of its property because the property is necessary for a safety and buffer zone adjacent to the permanent bomb and ammunition storage area of March Air Force Base. (App. A, Findings 15-18, 22, 28, 71; Plaintiff's Exhibit 79 at p. 22, lines 1-12).

as it has saved the day in many another sticky situation." *Id.* at 191 Ct.Cl. 413, 424 F.2d 587.

In *Eyherabide v. United States,* another case involving the activities of military authorities with regard to land adjacent to a base, the Court rejected the argument that the taking was not compensable because not authorized. The Court noted that the acts of the military personnel were within the general scope of their duties, and "[t]hey cannot be characterized as unauthorized merely because they may have been mistaken, imprudent or wrongful." *Id.* at 170 Ct.Cl. 606, 345 F.2d 570. But the holding of the decision below is precisely the opposite: it denies compensation for the taking because the Air Force by-passed Congress' appropriations procedures.

These conflicts justify the grant of certiorari to review the judgment below.

2. The Court of Claims' Decision That Petitioner Should Seek Relief in the District Court Departs so Far From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

In the condemnation action filed in the District Court in 1972, the Government moved to strike petitioner's affirmative defenses that: (1) the selection of the interest to be condemned was arbitrary and capricious, and (2) the Government's condemnation of a succession of one-year leases had actually effected a taking of the fee, for which petitioner should be compensated in the condemnation court. (App. F at 63-64; App. G). Concluding that the Government's motion to strike was well taken, petitioner filed a notice of non-opposition to the motion to strike, reserving its right to proceed in the Court of CLaims, and the District Court granted the motion. (App. H, I). Incredibly, once the present

action was filed, the Government consistently argued that the Court of Claims couldn't hear petitioner's claims either. (*See* Defendant's Post-Trial Brief at 8-11; Defendant's Brief in Support of its Motion for Summary Judgment at 5-10).

The Court of Claims' decision that petitioner should seek relief in the District Court rewards the Government's merry-go-round litigation tactics and ignores its own precedent of *Peerless Coal Co. v. United States, supra,* 215 Ct.Cl. 1045, 1046 (1978). Petitioner has been left in limbo, for there is nothing to indicate that it could ever get a hearing in the District Court on the merits of its objection to the Government's land acquisition strategy.

The gravamen of petitioner's claim is that the Government has in fact taken a greater interest in land than that acknowledged in its declaration of taking. But the District Court must follow the Ninth Circuit's decision that such a claim shall be heard in a Tucker Act suit in the Court of Claims (*United States v. 40.60 Acres of Land, Etc., supra,* 483 F.2d 927, 928 (9th Cir. 1973)), regardless of the Court of Claims' direction to petitioner. Moreover, the District Court long ago dismissed petitioner's affirmative defenses alleging both a taking of the fee and arbitrary and capricious (bad faith) selection of the land to be condemned. Petitioner's rights should not depend on the Court of Claims' speculation that the District Court might change its ruling and allow petitioner a forum for its claims.

Assuming that petitioner could secure a hearing in the District Court on the merits of its objections to the taking, the Court of Claims' decision would mandate a wasteful and counterproductive litigation exercise. The decision below tells the landowner that, where the Government in fact takes property for which it has not obtained an appropriation from Congress, the landowner may not obtain money com-

pensation but must instead seek to prevent or invalidate the taking itself. This approach would force unnecessary and nonsensical litigation in the many cases like the one at bench where the landowner does not challenge the legitimacy of the taking, only whether the Government has paid compensation for all that it has actually taken.

Moreover, the decision-making structure envisioned by the Court of Claims runs contrary to Congress' allocation of judicial responsibility. The condemnation court does not have authority to vary the estate described in the declaration of taking or to compel the Government to take and pay for some other estate. *Wilson v. United States*, 350 F.2d 901, 906 (10th Cir. 1965); *United States v. Brondum*, 272 F.2d 642, 646 (5th Cir. 1959); *United States v. 64.88 Acres of Land*, 244 F.2d 534, 536 (3d Cir. 1957). This limitation on authority allows the expeditious determination of condemnation actions, in which the only issue is the amount of compensation to be paid.

The decision below would turn this allocation of responsibilities on its head and would inject into the condemnation proceeding complex issues concerning what interest in land the agency has really acquired, what interest the agency really needs, and its motivation for making that determination of need. This problem would have substantial practical importance far beyond the present action, for the successive condemnation of term interests in land is a procedure the Government uses to maintain permanent control over other properties adjacent to March Air Force Base and at military bases around the country. (Defendant's Post-Trial Brief at 3-4; *Peerless Coal Co. v. United States, supra.*)

As in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 21 (1963), where this Court took action to correct a cumbersome and confusing set of procedures under the Jones Act, in the present case the Court should exercise its

power of supervision to prevent an ill-considered judicial innovation from confusing both condemnation proceedings and suits under the Tucker Act.

The Court should grant certiorari in order to exercise its power of supervision and clarify the proper forum for determination of the rights of petitioner and similarly situated property owners.

3. The Decision Below Raises Significant and Recurring Problems Regarding a Landowner's Remedies Against the Federal Government's Land Acquisition Practices.

The presently pending case of *San Diego Gas & Electric Co. v. City of San Diego* (No. 79-678, October Term, 1980), raises the question of whether a state may limit the remedies for a taking to mandamus and declaratory judgment designed to invalidate rather than compensate for the governmental action. The case at bench presents exactly the same issue with respect to federal courts' enforcement of the Fifth Amendment regarding the United States' actions.

The permanence of the Government's need to use petitioner's property as a safety and buffer zone (App. A, Findings 15-18, 22, 28, 71) dictates that petitioner will never be restored to the right to "possess, use and dispose of" its property. *See United States v. General Motors*, 323 U.S. 373, 378 (1945). Thus, the Government has in fact taken a fundamental element of petitioner's property rights. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). However, the decision below holds that, for want of proper authorization, this is not a *compensable* taking and indicates that petitioner's remedy is in the District Court by way of dismissal of the condemnation suit or injunction against the taking.

The Court of Claims' holding that a taking will not be compensable if the taking agency failed to utilize an available appropriation procedure squarely covers the typical inverse condemnation case, in which the agency has the power to condemn the interest actually taken but did not secure the funds. Thus, the practical effect of the Court of Claims' decision for Fifth Amendment taking cases involving the federal government is virtually the same as if it had, like the California courts, announced that money damages would not be available at all as a remedy for an uncompensated taking.

If this Court reverses the judgment below in *San Diego Gas & Electric Co.* and restores the vitality of money compensation as a remedy for a taking by a state agency, it must inevitably take the same approach in the case at bench. A reversal in *San Diego Gas & Electric Co.* that did not go hand in hand with a reversal in the present action would leave a serious discontinuity in the rights available under the Fifth and Fourteenth Amendments.

The Court should grant certiorari in order to resolve the significant and inevitably recurring problem of the scope of the landowner's remedies against the federal government's land acquisition practices.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

DATED: January 29, 1981.

Respectfully submitted,

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